

**Testimony on Senate Bill 305 before the Senate Local Government Committee
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The purpose of the Subdivision and Platting Act is to have subdivisions reviewed and to have their negative impacts mitigated. This bill works toward the opposite outcome – making it harder to adequately review a subdivision.

This is not the type of bill in which you could fix a few problematic sections and then pass it. The problems with this bill are too numerous and too serious for it to be “fixed.”

“Substantial credible evidence” language is added in at least 4 places in this bill. [Section 3, p. 2, lines 27 and 28; Section 6, p. 8, lines 28-29; Section 6, p. 9, line 17; and Section 6, p. 9, lines 25-27]. This “substantial credible evidence” language changes the standard by which courts review the subdivision decisions of local governments. This type of change should not be taken lightly.

Using the “substantial credible evidence” standard allows courts more opportunity to second-guess the decisions of local government. Subdivision decisions are entrusted to local governments, not courts. Local governments are far more familiar with planning issues and answer directly to the public.

Courts currently review subdivision decisions using the “arbitrary, capricious, or unlawful” standard. *Madison River R.V. Ltd. v. Town of Ennis*, 2000 MT 15, ¶¶ 29-30. That standard is applied to most, if not all, other agency decisions. It is a relatively deferential standard, and rightly so. Courts try not to interfere with decisions that are entrusted to the legislative and executive branches. That is a hallmark of the Separation of Powers doctrine.

This amendment elevates subdivision decisions above all other local government decisions. Why would we treat subdivision decisions differently? Why would we want courts making subdivision decisions?

Section 3, p. 3, lines 20 and 21. Why should utilities or government agencies be required to submit their comments 10 days before the general public? Those comments are frequently the most important and useful comments provided. If delay is the concern, which it appears to be, there is already protection in this subsection. Lines 17-20 say that the review timeline may not be delayed because of these comments.

Section 3, p. 5, lines 14 and 15. This amendment imposes an impossible requirement. Subdividers do not bring a complete or final application to a pre-application conference. Therefore, planners cannot possibly know what rules and regulations will apply to the application until they actually have the application. This proposed amendment essentially makes the planner do a full review of the subdivision before they even see the application.

Section 4, p. 6. Let's be honest, the changes in this section are aimed at dealing with road improvements. Let's also acknowledge that almost all local roads in this state have existing deficiencies. In counties that have minimum road standards, very few roads actually meet those road standards. That is the backdrop with which you should look at the amendments in this section. Those amendments are an attempt by subdividers to get out of paying their share of road improvements.

Lines 8 and 9. If Applegate Drive is currently substandard, and a subdivider wants to do a 100 lot subdivision on it, shouldn't the subdivider pay his share of improving that road. If you won't allow local governments to collect that share through subdivision review, how can the local government approve 800-1000 new vehicle trips per day on Applegate Drive? How can local governments protect the public health and safety in that situation, short of denying the subdivision? How can you ask local officials to explain the fairness of an additional 1000 ADTs to the other drivers on Applegate?

Lines 10-12. Local governments cannot force existing users of a road to pay anything. RIDs all allow users to protest, and no existing user is going to approve an RID to subsidize development.

Section 5, p. 7, lines 10 and 11. There is no reason for this limitation. The review process is fluid. Planners can't know everything up front. The purpose of review is to fully explore the impacts of a subdivision. This amendment unnecessarily hinders the full review of a subdivision.

Section 5, p. 7, lines 26 and 27. THIS IS THE MOST IMPORTANT ISSUE IN THIS BILL. The appropriate remedy for missing the 60-day review deadline is not automatic approval. That outcome only hurts the public, and you are here to protect and serve the public. The appropriate remedy is a Writ of Mandate from a district court. The subdivider would ask the district court to order the local government to make a decision. This type of court proceeding would be short and simple.

The entire purpose of the S&P Act is to have subdivisions reviewed. This automatic approval amendment defeats that purpose. It would allow a 1000 lot subdivision to go completely un-reviewed, with none of its impacts mitigated, all because a local government missed the deadline by one day, or even one hour. If you want to add a penalty for missing the deadline, make local governments pay for legal fees or assess some other type of penalty against local government. This penalty only hurts the public, and it is too heavy-handed.

Section 6, p. 9, lines 25-27. This is a huge change. Under subsection (3), "public health and safety" is just one of many review criteria. The other criteria include impacts on agriculture, local services, the natural environment, wildlife, compliance with survey requirements, compliance with local subdivision regulations, whether the subdivision has legal and physical access. With this amendment, a local government would be prevented

from denying a subdivision based on those other criteria, regardless of how great the negative impact is.

Line 27. Does “mitigated” mean “fully mitigated,” “substantially mitigated,” or just “mitigated in any amount?” Mitigate means: “to make less severe, intense, harsh, rigorous, painful, etc.; to diminish; to lessen.” You can mitigate a little bit or you can mitigate fully. This amendment is completely ambiguous and will lead to extensive litigation. Every negative impact can be mitigated to some extent. Local government should be given discretion to determine how much mitigation is required.

Section 9, p. 12, lines 3 and 4. The point of this subsection is to describe the latest date that an appeal may be filed. It should not reference the oral decision at all. 30 days after the written decision will always be later than 30 days after the oral decision.